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No. 93-1341

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY, and
ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITIONERS' REPLY MEMORANDUM

WILLIAM J. MURPHY
(Counsel of Record)
JOHN J. CONNOLLY
MURPHY & SHAFFER
Suite 750
100 Light Street
Baltimore, MD 21202-1019
(410) 752-1564
Counsel for Petitioners

THOMAS K. HENDERSON
PATRICIA J. CLARK
MICHAEL D. McDOWELL
West Penn Power Company
800 Cabin Hill Drive
Greensburg, PA 15601-1689
(412) 837-3000
Of Counsel for Petitioner West Penn Power Company

DAVID F. BOEHM
MICHAEL L. KURTZ
BOEHM, KURTZ & LOWRY
2110 Society Bank Center
36 East Seventh Street
Cincinnati, Ohio 45202
(513) 421-2255
Of Counsel for Petitioners Armco Advanced Materials Company and Allegheny Ludlum Corporation

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PETITIONERS' REPLY MEMORANDUM

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1. A common linchpin of the Briefs In Opposition filed by respondents Milesburg Energy, Inc., the developer of the QF project at issue in these proceedings, and Mon Valley Energy Corporation, an intervenor in the Pennsylvania proceedings, and the developer of the Shannopin Project, at issue in *West Penn Power Company, et al.* v. *Pennsylvania Public Utility Comm'n, et al.*, No. 93-1535, is that this Court should deny review because the decision below is not final. *See* Milesburg Opp. at 5-6, 15-16; Mon Valley Opp. at 2, 9, 18-21. According to respondent Milesburg, the "outcome of these utility regulation proceedings is in no sense preordained." Opp. at 6.

Not surprisingly, the respondent Pennsylvania Public Utility Commission ("PUC") does not make this jurisdictional argument. That is because with respect to the

questions of federal law posed by this Petition, so far as the Pennsylvania PUC and reviewing courts are concerned, the outcome *is* preordained. This is demonstrated conclusively by the decision of the PUC in the Shannopin proceedings, refusing to permit West Penn even to attempt to demonstrate that the rates established in an agreement executed in 1987, and thereafter modified by the PUC over West Penn's objection, no longer were just and reasonable to the utility's customers and no longer were less than the utility's avoided costs when determined as of the date of the PUC's order requiring the modifications. That decision was affirmed by a four to three vote of the Commonwealth Court in *West Penn Power Co.* v. *Pennsylvania Public Utility Comm'n*, 150 Pa. Commw. Ct. 349, 615 A.2d 951 (1992), *app. denied*, —— Pa. ——, 637 A.2d 291 (1993), *petition for cert. pending*, No. 93-1535 (filed Mar. 29, 1994). The PUC's further proceedings with respect to the Milesburg rates thus are "preordained" by the outcome in the Shannopin case, and by the subsequent decisions in another related case involving the "Burgettstown" project. *See Armco Advanced Materials Corp.* v. *Pennsylvania Public Utility Comm'n*, 157 Pa. Commw. Ct. 150, 629 A.2d 221, 226 (1993), *app. denied*, —— Pa. ——, —— A.2d —— (1994) (holding that "time was frozen when the [contract] became effective, and all calculations had to be made as of that date").

2. The question of finality under 28 U.S.C. § 1257 raised by respondents is answered by such decisions as *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299 (1989), which determined that a decision of the Pennsylvania Supreme Court involving rate proceedings represented a "final judgment" with respect to the federal issues presented, in spite of the fact that the state courts had remanded the case to the PUC for a revision of relevant rate orders. *See also Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-487 (1975) (describing four categories of cases in which a state court's decision on the federal issue

presented by a petition is deemed to be "final" despite the fact that further proceedings in the state courts are anticipated). As in *Duquesne Light*, the opinion of the Commonwealth Court in this case (and the per curiam affirmance by the Pennsylvania Supreme Court) represent the "last word" of the state courts on the questions of federal law presented by this Petition. And in light of the subsequent decisions in the Shannopin and Burgettstown proceedings, it is abundantly clear that the rates for the Milesburg project will be set based on factors that are now known. *Cf. Duquesne Light, supra,* 488 U.S. at 317-18 (Blackmun, J., dissenting as to final judgment holding).

3. Petitioners agree with respondent Mon Valley that the issues involved in this Petition are "inextricably intertwined with the decisions of the Pennsylvania courts in the other cases involving QF projects that entered [contracts] with West Penn." Mon Valley Opp. at 5. One such project is Mon Valley's "Shannopin" project, and similar issues to those presented in this Petition are now before this Court in No. 93-1535. In the Shannopin case, both the PUC and Mon Valley have been granted extensions of time to respond to the Petition, and it is anticipated that both a separate Pennsylvania utility, and the Edison Electric Institute, acting on behalf of investor-owned electric utilities nationwide, will seek to file amicus briefs in support of the Petition for Writ of Certiorari in that case. Petitioners respectfully suggest that disposition of this Petition should be withheld pending consideration of the fully-briefed Petition in No. 93-1535.

4. Petitioners also have suggested that this Court seek the views of the Solicitor General concerning the importance of the federal questions presented in this Petition. Pet. at 17, n.7. Respondent Milesburg argues that this suggestion is "untimely and inappropriate." Opp. at 9, n.4. Milesburg goes on to argue, moreover, that review by this Court is inappropriate because petitioners "long ago" could have sought an interpretive ruling from FERC

"with respect to the very FERC regulation that the petitioners have placed in issue: 18 C.F.R. § 292.301 (b)(1)." Opp. at 8-9 & n.4. Milesburg's only authority for this proposition is a series of misleading quotations from the preamble to the FERC regulations. The full context of the preamble (which is reprinted in the Appendix to respondent PUC's Opposition) actually indicates that FERC was responding to concerns, expressed by State commissions, that the new regulations might divest the commissions of authority to review contracts for purchases of electric power. FERC concluded that the States would indeed lose that authority to the extent it was in conflict with PURPA or the FERC regulations. 45 Fed. Reg. 12214, 12233 (Feb. 25, 1980). FERC suggested, however, that if the *States* had questions about the new limitations on their authority under PURPA and the FERC regulations, then "*States* . . . should seek an interpretive ruling from [FERC's] General Counsel." *Id.* (emphasis added). Petitioners would have been delighted if the Pennsylvania PUC had decided to seek an interpretive ruling from FERC; the PUC's consistent failure to honor federal limitations on its authority lies at the heart of the petitioners' challenges to the PUC's orders. Petitioners cannot be faulted for the Pennsylvania PUC's failure to seek interpretive guidance from FERC; and, in any event, statutory interpretations by FERC's General Counsel do not represent the "official views of the Commission," *see* 18 C.F.R. § 388.104(a), and thus would not bind FERC or the Pennsylvania PUC.

5. All respondents argue that "variation" among state interpretations of PURPA is simply a desirable result of "PURPA's unique brand of cooperative federalism." *See* Milesburg Opp. at 9. *See also* PUC Opp. at 14; Mon Valley Opp. at 14. Describing PURPA as a "unique brand of . . . federalism" is rather like describing a black automobile as a "unique shade of white." The issue that divided this Court in *FERC v. Mississippi*, 456 U.S. 742 (1982), was whether PURPA's "unprecedented burdens,"

in the form of mandatory state consideration of federal policy goals, were such a profound departure from "long-standing deference to principles of federalism" as to violate the Tenth Amendment. *See id.* at 772 (Powell, J., concurring and dissenting). That a majority of this Court upheld PURPA against a Tenth Amendment challenge does not mean that the States were left free to develop a patchwork of common law under PURPA §210. On the contrary, *FERC v. Mississippi* stands for the proposition that the States *must follow* the federal policies under PURPA § 210, *see id.* at 759-61, and therefore PURPA sharply *limits* state experimentation. Milesburg's repeated citations to footnote 29 of *FERC v. Mississippi* do not change that result; footnote 29 explains this Court's views of the Congressional intent under different PURPA provisions that require State commissions merely to *consider* federal standards. This case arises under § 210 of PURPA, which *mandates* state implementation of federal policy goals, and was the subject of a different analysis in *FERC v. Mississippi*. Thus, this Court has *not* ruled, nor could it rule, that *§ 210* of "PURPA 'gives full force to the States' ultimate policy choices.'" *See* Milesburg Opp. at 10 (quoting *FERC v. Mississippi*, 456 U.S. at 765 n.29). The "federalism" analysis appropriate to this case is that set forth in the preamble to the FERC regulations: "If the authority [of State commissions to review purchase contracts] or its exercise is in conflict with these sections of PURPA or the Commission's regulations thereunder *the State must yield to the Federal requirements.*" 45 Fed. Reg. at 12233 (emphasis added) (quoted in PUC Opp. at 17).

6. Each of the respondents has done its best to obfuscate the federal issues arising under PURPA that are squarely presented by this Petition. These questions involve whether a State commission can relieve a QF developer of contractual obligations it freely undertook (milestone completion dates) that were designed to protect ratepayers, while at the same time ordering the utili-

ties to pay for power based on avoided capacity costs calculated at the time of the contract's execution; and whether the commission may adopt the date of a contract's execution as the date for determining avoided capacity costs, even after the contract has lapsed, and even when the use of that date will result in rates far in excess of the utility's *current* avoided capacity costs.

That the Pennsylvania PUC does not understand these questions is demonstrated by the statement in its Opposition that "since the rate was the same as in the contract originally signed by West Penn . . . the rates could not be in excess, much less 'far in excess' of avoided costs." PUC Opp. at 5.[1] The Pennsylvania PUC literally seems incapable of comprehending that "avoided capacity costs" may change over time, and that rates negotiated in 1986 might be less than avoided capacity costs calculated in 1987, while those same rates might well be far in excess of avoided capacity costs calculated in 1989. The PUC's refusal or inability to recognize that a utility's load projections, and the most prudent means of meeting projected future load growth, will change over time—coupled with the inexplicable deference of the Pennsylvania courts to that view based on the purported requirements of "federal PURPA policy"—is what motivates this Petition.

If the PUC had recognized that the lapsed contract between West Penn and Milesburg had expired in 1989 by its own terms, and had issued an order *at that time* for West Penn to purchase power from the Milesburg project,

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[1] The PUC also argues that the 43 megawatts of capacity represented by the Milesburg project is "all but insignificant" and represents "only a small portion of the 900 megawatts of the more expensive plant West Penn originally intended to build." PUC Opp. at 16. The simple point is that in 1989, when the PUC ordered West Penn to abide by the payment terms of the lapsed Milesburg contract, West Penn was *not* planning to build a 900 megawatt plant; its projections at that time were that it needed *no* additional megawatts of new baseload capacity until the year 2003.

the rates for that power would have been determined in accordance with West Penn's then-current avoided capacity calculations. The PUC's refusal to follow the FERC regulations—in this and several other cases—has afforded windfalls to the QF developers and ultimately will cost West Penn's customers hundreds of millions of dollars in rates in excess of avoided capacity costs, properly calculated as of the time of the developer's legally enforceable obligation to deliver power. This result plainly violates the avoided cost provisions of § 210 of PURPA. Notwithstanding respondents' arguments to the contrary, Congress did not intend that State commissions would have "flexibility" to deviate from the legislative mandate that "[n]o such rule . . . shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b).

CONCLUSION

The Petition for Writ of Certiorari should be granted. In the alternative, this Petition should be heid pending consideration by this Court of the Petition in No. 93-1535, following which both Petitions should be granted and consolidated for plenary review.

Respectfully submitted,

WILLIAM J. MURPHY
(Counsel of Record)
JOHN J. CONNOLLY
MURPHY & SHAFFER
Suite 750
100 Light Street
Baltimore, MD 21202-1019
(410) 752-1564
Counsel for Petitioners

THOMAS K. HENDERSON
PATRICIA J. CLARK
MICHAEL D. MCDOWELL
West Penn Power Company
800 Cabin Hill Drive
Greensburg, PA 15601-1689
(412) 837-3000
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DAVID F. BOEHM
MICHAEL L. KURTZ
BOEHM, KURTZ & LOWRY
2110 Society Bank Center
36 East Seventh Street
Cincinnati, Ohio 45202
(513) 421-2255
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